party little. If it be any consolation I would remind them that nothing can deprive them of their right of appeal to the judgment of history.

Solicitors:—*Wan Mustapha & Co.*

KHEMANICO TEXTILES v. GIAN SINGH & CO. LTD.

[O.C.J. (Buttrose J.) September 20, 1963]

[Singapore — Suit No. 1384 of 1961]

Contract—Local indenting agent contracting on behalf of foreign principal—Breach—Whether indenting agent can sue in its own name—Presumption based on mercantile custom that indenting agent personally liable —When rebutted.

The plaintiffs as indenting agents claim $5,622.18 under contracts for the supply of textiles to the defendants by three Japanese firms. Payments under these contracts were to be made by establishing letters of credit in favour of the Japanese suppliers. The plaintiffs claim that the failure of the defendants to open these letters of credit in favour of the Japanese suppliers resulted in the goods being sold elsewhere and the defendants being debited with the loss on resale plus interests storage charges and return commission. The defendants contend that the claim is bad in law as the plaintiffs have no *locus standi* because they acted as agents. They also contend that the letters of credit were established but not availed of by the Japanese suppliers.

Held: taking into consideration the form of these contracts, the words used and the surrounding circumstances the plaintiffs who signed these contracts were not making themselves personally liable, and this conclusion was not rebutted by the presumption based on mercantile custom that a home agent who contracted on behalf of a foreign principal had no authority and was personally liable because the plaintiffs clearly had the authority of their foreign principals. *Holt & Moseley Ltd.* v. *Cunningham & Partners,*(4) *Rusholme Ltd.* v. *Read Ltd.*(5) and *Brandt & Co.* v. *Morris & Co.*(2) followed. *Cox* v. *Sorrell* (6) disapproved.

Cases referred to:—

(1) *Gadd* v. *Houghton* 1 Ex.D 357 at p.360.

(2) *Brandt & Co.* v. *Morris & Co.* [1917] 2 K.B. 784.

(3) *Fairlie* v. *Fention* (1870) 5 Ex. Co. 169.

(4) *J. S. Holt & Moseley (London) Ltd.* v. *Sir Charles Cunningham & Partners* (1949) 83 Ll.R. at p. 145.

(5) *Rusholme Ltd.* v. *S. G. Read Ltd.* [1955] 1 All E.R. 180 at p.183.

(6) *Cox* v. *Sorrell* [1960] 1 Lloyds' Rep. 471.

SUIT.

K. E. Hilborne for the plaintiffs.

L. A. J. Smith for the defendants.

Cur. Adv. Vult.

Buttrose J.: This is a claim for $5,622.18 for breach of contract. The plaintiffs as indenting agents have various contacts in Japan and the claim arises out of four contracts regarding the supply of textiles to the defendant company by three Japanese firms. In respect of all these contracts payment was to be made by establishing letters of credit in favour of the Japanese suppliers. As a result, according to the plaintiffs, of the failure by the defendant to open these letters of credit in favour of the Japanese suppliers to enable them to despatch the goods to Singapore in exchange for payment the goods were sold elsewhere and the defendant company debited with the loss on re-sale plus interest, storage charges and return commission.

The defendants contend that claim is bad in law in that the plaintiffs have no *locus standi* because they acted as agents. On the facts, the defendants say that letters of credit were established but not availed of by the Japanese suppliers.

Now the plaintiffs acted in the transaction as indenting agents and the evidence of Mr. Khemani, the managing partner of the plaintiff firm, was that the four contracts in question were made by him as agent for the three Japanese suppliers.

The substantial point to be determined at the outset is whether the plaintiffs, as the identing agents, can sue on these contracts or must their principals the Japanese Suppliers do so.

All the four contracts sued upon are headed "Khemanico Textiles" who are described as "Manufacturers' Representatives, Importers and Exporters". The contracts are described as Orders and given a number. They go on to state that the Order is placed by Messrs. Gian Singh & Co. Ltd. (the defendants) and that the suppliers are the Japanese firms therein mentioned. Then follow various items dealing with the description, quantity, quality and the price of the goods and also the terms of payment. They are signed by the defendant company as "Buyers" and by the plaintiff firm as "Identing Agents".

Attached to all the four contracts are "Conditions of Sale" which are expressly stated to govern the acceptance of the orders for the goods comprised in the contracts and shall be deemed to form part thereof.

The Conditions of Sale attached to the first contract are not the same as those attached to the remaining three. In the latter it is expressly stated in clause 1 of the Conditions of Sale in each case that:—

"This Order is placed by us with Messrs Khemanico Textiles (hereinafter referred to as 'Agents') as agents and not as principals and notwithstanding anything at law to the contrary we, the buyers, agree and undertake not to hold the agents personally liable in respect of this Order or any resulting contract or anything done

or omitted to be done by them in respect of this Order or any resulting contract."

There is no such condition attached to the first contract but that fact does not, in the view I take, materially affect the position.

The general principle applicable is that where a person signs a contract in his own name without qualification, he is *prima facie* to be deemed a person contracting personally, and in order to prevent the liability from attaching, it must be apparent from the other parts of the document that he did not intend to bind himself as principal. See *Gadd* v. *Houghton* [1] and *Brandt & Co.*, v. *Morris & Co.*[2].

Taking into consideration the form of these four contracts and the words used together with all the surrounding circumstances there is, in my view sufficient to show that the plaintiffs, Khemanico Textiles, who signed them in their own name were not making themselves personally liable. Mr. Khemani himself said that these four contracts were entered into by him as agent for the Japanese suppliers. His evidence was that as an indent agent all he got out of these contracts was the commission. He was not entrusted by the Japanese Suppliers with the custody of the goods. They never came into his possession. He was not authorised to buy or sell the goods in his own name. Payment was made to the Japanese suppliers. He signed the order form as indent agent only.

The plaintiffs signed these contracts as "Indenting Agents" which I think indicates a special capacity rather than a general description. Their general description is "Manufacturers' Representatives, Importers and Exporters" but they signed the contracts in the capacity of indenting agents. Now an indent is simply a written order for goods and an indent agent is a person who obtains and makes out these written orders. The plaintiffs as indenting agents in this case were making contracts between their principals and another person. They had no right to sue for the price of the goods and no right to sue for breach of contract. As in the case of the broker in *Fairlie* v. *Fenton* [3] the plaintiffs here were acting as mere negotiators or middle-men between the two parties, they had no interest and cannot sue.

Now these contracts were alleged to be made on behalf of foreign principals (the Japanese suppliers) and there used to be a presumption based apparently on a mercantile custom that a home agent who contracted on behalf of a foreign principal had no authority and was therefore personally liable. The principal's liability was said to be excluded. The presumption was rebutted if it appeared from the terms of the contract, or the circumstances surrounding it, that the agent definitely did have the authority of the foreign principal. No doubt such a presumption was required in days when methods of transport and communications were much less rapid and efficient than they are today. As far back as 1917 Scrutton L.J. in *Brandt & Co.* v. *Morris & Co., supra,* at page 797 said:—

> "The other fact which I take into account is that Messrs Sayles Bleacheries are foreigners, and while I think that one cannot at the present day attach the importance which used to be attached forty or fifty years ago to the fact that the supposed principal is a foreigner, it is still a matter to be taken into account in deciding whether the person said to be an English agent has or has not made himself personally liable."

To-day I think even less importance can be attached to it and under modern commercial conditions the presumption may be rebutted without much difficulty.

In *J. S. Holt and Moseley (London) Ltd.*, v. *Sir Charles Cunningham & Partners* [4] Pritchard J. said:—

> "The so-called presumption or trade usage to this effect cannot, I think, be regarded as existing as part of the law governing commercial contracts, and the true view seems to be merely this — that when a question is raised as to the legal position of an agent contracting for a foreign principal, it is in each case a question of what the parties intended. The intention of the parties can only be ascertained from the facts as proved in evidence, and the nationality and whereabouts of the principal is no more and no less than one of the facts to which such weigh will be given as in any particular case the Court thinks proper."

In *Rusholme Ltd.* v. *S. G. Read Ltd.*,[5] Pearce J. accepts the views of Scrutton L.J. in *Brandt & Co.* v. *Morris & Co., supra,* which I have quoted. In a more recent case however of *Cox* v. *Sorrell* [6] Pitcher J. approved the continued current existence of the presumption, apparently as a presumption of law but with the greatest respect I am of the opinion that the views expressed in the other cases to which I have referred correctly set out the law.

The plaintiffs, in my view, clearly had the authority of the foreign principals (i.e. the Japanese suppliers).

This is sufficient to dispose of the case in the defendants' favour and it is unnecessary to proceed further.

I think I should add however that I do not consider these so-called contracts were ever contracts in the legal sense at all. They represent simply an order or request to supply goods and do not become contracts until certain conditions precedent have been fulfilled and the orders confirmed by the Japanese Suppliers.. It was contended by Mr. Hilborne on behalf of the plaintiffs that it was not now open to the defendants to raise this point as it had not been pleaded

and in fact the defendant had admitted entering into these contracts in their defence. Mr. Smith for the defendants sought to amend but an amendment was, in my opinion, not necessary as if it transpired that the document was not a contract it was the duty of the Court so to find whether pleaded or not. I think the real effect of the pleading, which was a simple traverse, was that the document whether contract or order was admitted.

The plaintiffs as indenting agents were acting on behalf of foreign principals and had no power to contract but simply a sole and exclusive right to obtain orders. In the Conditons of Sale attached to the last three Orders reference is specifically made in each case to "the Order or any resulting contract."

For these reasons, in my judgment, the plaintiffs' claim fails at the outset and it is unnecessary to consider the facts.

All I need add in passing is that no attempt was made to prove the damages, with the possible exception of the plaintiffs' commission, and this, as I understood it, was conceded by Mr. Hilborne.

Assuming therefore that the plaintiffs were successful in respect of all the four transactions both on the law and on the facts the total amount of their claim would be limited to $730.69.

There must be judgment for the defendants and the plaintiffs' claim is dismissed with costs.

Judgment for the defendants.

Solicitors:—*Hilborne, Chung & Co.; L. A. J. Smith.*

PUBLIC PROSECUTOR v. KOK KHEE

[A.Cr.J. (Ong J.) September 27, 1963]

[K.L. — Criminal Appeal No. 53 of 1963]

Criminal Procedure—Arrest by police constable—Non-compliance with proper form—Criminal Procedure Code (Cap.6), ss.15 & 294—Illegal arrest—Whether use of force by accused justifiable.

Municipal Ordinance (S.S. Cap. 133) s.53—By-laws—Hawking without licence—Municipal (Itinerant Hawkers) By-laws, 1957, By-law 2.

Penal Code s.353—Assaulting police constable in execution of duty—Arrest not in proper form—Whether arrest illegal.

The respondent was charged on two charges namely (i) hawking vegetables without a licence contrary to By-law 2 of the Kuala Lumpur Municipal (Itinerant Hawkers) By-laws, 1957, an offence under section 53 of the Municipal Ordinance and (ii) using criminal force on a police constable in the execution of his duty an offence punishable under section 353 of the Penal Code. He pleaded guilty to both charges and the Magistrate fined him $10 for the first offence and on the second offence he was bound over for $100 to be of good behaviour for 6 months. On appeal by the Public Prosecutor against the inadequacy of sentence in respect of the second charge,

Held: from the facts as stated by the learned Magistrate the arrest was not made in the proper form as required by section 15(i) of the Criminal Procedure Code and it was justifiable for the respondent to put up a struggle since he was resisting an illegal or unjustifiable use of force against him.

Reasons advanced for not imposing prison sentence.

MAGISTRATE'S CRIMINAL APPEAL.

Gunn Chit Tuan (Deputy Public Prosecutor) for the appellant.

Respondent — not served — absent.

Ong J.: The respondent was charged in the Magistrate's Court at Kuala Lumpur on two charges, namely, (1) hawking vegetables without a licence contrary to By-law 2 of the Kuala Lumpur Municipal (Itinerant Hawkers) By-laws 1957, an offence punishable under section 53(3) of the Municipal Ordinance, and (2) using criminal force to P.C. 28120, a public servant, in the execution of his duty as such public servant, an offence punishable under section 353 of the Penal Code.

Upon pleading guilty and admitting the facts alleged by the prosecution, he was fined $10 on the first charge, and, on the second charge, was bound over in the sum of $100 to be of good behaviour for 6 months under section 294 of the Criminal Procedure Code. The Public Prosecutor appeals against the inadequacy of sentence in respect of the second charge.

The admitted facts, as set out in the record, are as follows:

"On 7.7.63 at about 6.45 a.m. P.C. 28120 and P.C. 1612 were on beat round along Banting Road, Kuala Lumpur and saw accused selling vegetables without a licence. P.C. approached him and told him of the offence. He put up a struggle and took up a daching stick and assaulted P.C. 28120 and the P.C. was injured. Accused was arrested. Medical certificate on P.C. produced, marked 'P1'. Accused taken to High Street Police Station and P.C. 28120 lodged a report."

I think the learned Magistrate properly took a lenient view of a first offence since it had its origin in a trifling transgression of a Municipal By-law. Moreover, the facts as stated in skeleton outline, would appear to justify the respondent putting up a struggle since he was resisting an illegal or injustifiable use of force towards him. Unless and until an arrest had been made legally, in the proper form, as set out in section 15(i) of the Criminal Procedure Code — and there is nothing to suggest that this had been done — the respondent was, in my opinion, entitled to prevent or resist what ostensibly was an unlawful seizure or confiscation of the "daching" which